FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 28 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1946

No. 1168-1170

HUDSON McGUIRE, *et al.*,

Petitioners,

v.

EQUITABLE OFFICE BUILDING CORPORATION (name changed to "EQUITABLE OFFICE BUILDING 1913 CO. INC."), Debtor,

ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders of Debtor, and

CHARLES A. DANA, *et al.*, Committee of Common Stockholders of Debtor,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE T. BARKER,
Counsel for Petitioners,
30 Church Street,
New York 7, N. Y.

INDEX

TABLE OF CASES

STATUTES

Supreme Court of the United States
OCTOBER TERM 1946

No. .

HUDSON MCGUIRE, *et al.*,
Petitioners,

v.

EQUITABLE OFFICE BUILDING CORPORATION (name changed to "EQUITABLE OFFICE BUILDING 1913 CO. INC."), Debtor,

ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders of Debtor, and

CHARLES A. DANA, *et al.*, Committee of Common Stockholders of Debtor,
Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully pray that writs of certiorari issue to the Circuit Court of Appeals for the Second Circuit to review the judgments of that court (R. 436, 437) filed on December 31, 1946 and January 28, 1947, respectively, and the order of that court (R. 438) filed on January 28, 1947.

The judgment filed on December 31, 1946 reversed orders of the District Court for the Southern District of

New York, denying petitions of stockholders Knight and Doyle to "alter" and "amend" a plan of corporate reorganization and vacate the order of confirmation. The judgment filed on January 28, 1947 reversed orders in the same matter denying petitions of the Debtor and a Committee of Common Stockholders of the Debtor to dismiss the proceedings in reorganization, upon completion of proposed refinancing upon terms identical with the proposals of Knight and Doyle. The order entered January 28, 1947 was ancillary to the two judgments of the said Circuit Court of Appeals.

Petitioners are holders of debenture bonds of the debtor.

Opinions of the Courts Below

The District Judge filed a memorandum opinion on July 16, 1946 (R. 99) regarding the denial of the petitions. The memorandum opinion has not been reported.

The opinion of the Circuit Court of Appeals for the Second Circuit regarding the petitions of Knight and Doyle (R. 427-435) was filed December 31, 1946. The Opinion is reported at 158 F. 2nd 838. The *per curiam* opinion of that court regarding petitions of the Stockholders' Committee and the Debtor (R. 437) was filed January 28, 1947. The *per curiam* opinion is reported at 158 F. 2nd 982.

(The opinion of Mr. Justice Reed of this court, filed August 6, 1946 (R. 362-369) upon a matter preliminary to the determinations of the Circuit Court of Appeals for the Second Circuit has not been reported as yet.)

Jurisdiction

Jurisdiction to issue the writs requested is found in the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347 (a)) and Section 24 (c) of the Bankruptcy Act (Title 11, U. S. C. A. Section 47 c).

Statutes Involved

The pertinent provisions of the Bankruptcy Act, as amended, are found in the appendix to this Petition.

Statement

On April 10, 1941, the Debtor filed its voluntary petition for reorganization under Chapter 10 of the Bankruptcy Act, in the District Court for the Southern District of New York. On that day, the petition was approved and trustees were appointed (R. 1).

After five years of proceedings, a plan of reorganization of the Debtor was accepted by the requisite vote of interested security holders and was regularly confirmed by the court (R. 244-8).

The plan provided for participation by stockholders of the Debtor for the reason that the court, over the objection of the Securities and Exchange Commission, found a nominal equity for shareholders (R. 181).

The order confirming the plan was entered on May 13, 1946 (R. 261). The time to appeal from the said order expired on June 22, 1946. No appeal was taken.

Consummation of the Plan was completed, except for the transfer of the properties and formal exchange of securities. By orders dated respectively June 7, 1946 and June 24, 1946 (R. 3), the District Court approved the proposed officers and directors of a new corporation to be formed under the Plan, an indenture trustee for new income bonds to be issued to the debenture holders, the proposed certificate of incorporation, by-laws, stock certificates, scrip certificates, and the statement and designation required to qualify in New York State the new corporation to be used under the Plan to take over the assets of the Debtor. The orders "authorized and directed" that such documents be executed and filed. On July 8, 1946, the District Court made and entered its order of consummation (R. 273) which,

among other things, "authorized, ordered and directed" the execution and delivery of various instruments necessary to the consummation of the Plan.

The consummation of the Trustee's Plan accomplished the following: The old corporation was deprived of its power to do business under its corporate name; the new corporation provided for by the Plan was duly organized and qualified to do business in the State of New York; the officers and directors approved by the court were elected; the securities were printed; the new trust indenture as approved by the court was printed and qualified with the Securities and Exchange Commission; the new stock was approved for listing by the New York Stock Exchange, subject to transfer of the properties, a transfer agent and a registrar for the new stock was appointed and approved by the court; the instruments of conveyance by the Trustees of the new corporation were executed and arrangements were completed for the opening of bank accounts for the new corporation.

The stockholders were ably represented, the Stockholders' Committee, acting through its counsel, taking an active part in all the proceedings. The Committee joined with the debenture holders and other parties in requesting the parties to approve and confirm the Trustee's Plan.

On July 11, 1946, twenty days after the time to appeal from the order of confirmation had expired and when final consummation of the Plan by delivery of the instruments of conveyance was awaiting only formal clearance of the trust indenture by the Securities and Exchange Commission, the first of the several *ex-parte* petitions was filed by Knight and Doyle, stockholders (claiming to own 2,200 shares) seeking to file so-called "amendments". Neither Knight nor Doyle is a stockholder of record (R. 63).

In their original petition (R. 4) petitioners Knight and Doyle sought an order to show cause (R. 15) why the confirmed plan of reorganization should not be "modified"

and "amended", and the consummation of the confirmed Plan stayed pending consideration and approval of their proposed amendments. By a second or supplemental petition (R. 38) and a third petition (R. 147) petitioners Knight and Doyle sought precisely the same relief as in the first petition, except that in the third petition they also prayed for a vacation of the order of confirmation and the order of consummation.

The so-called amendments to the confirmed Plan proposed in these three petitions constituted in reality a new Plan. Under the terms thereof it was proposed that $5,172,588 should be raised by giving to the stockholders for each share of old stock, a right to subscribe at $6.00 per share for one share of stock of the new corporation to be organized under the Plan. With the money thus raised, supplemented by cash to be taken from the Treasury of the Debtor, it was proposed that the debentures be paid in full with accrued interest. The petitions were supported by a purported commitment by City Investing Company to underwrite the purchase of the stock by the stockholders for an underwriting fee of 69,686 shares of the stock of the new corporation (R. 154-159).

The so-called commitment, which was dated July 19, 1946 (R. 154-159), expired October 16, 1946. The conditions of the so-called commitment were such that it could not be completed within the time specified. Under the agreement the Underwriter was not required to purchase any of the shares unless, prior to October 15, 1946, the proposed new plan should have been finally confirmed by the court, the new plan should have been consummated, any rights to appeal from orders confirming or relating to the consummation of the plan should have expired, any appeals which might have been taken should have been finally disposed of, the new stock should have been offered to the old stockholders and not subscribed for, delivery to the Underwriter of unsubscribed shares upon payment by it of $6 for each of such unsubscribed shares should be effected, delivery to the

Underwriter of 69,686 shares of new stock as a fee for underwriting should have been delivered. All must have been accomplished within the 80 odd days prior to October 15, 1946.

The petitions contained no allegations of fraud, irregularity or surprise or change in the economic condition of the Debtor since the Plan or reorganization was confirmed on May 13, 1946. No allegations were made that the Debtor's property was worth more than the value found by the court in its orders of approval and confirmation.

The original and supplemental petitions were denied by endorsement thereon by the District Judge on July 16, 1946 (R. 99). The third petition was denied by the District Judge by endorsement thereon dated July 31, 1946 (R. 146).

The proposals on behalf of the Committee of Common Stockholders and the Debtor were identical with the proposal of Knight and Doyle except that those petitioners sought a dismissal of the proceedings after the completion of the proposed financing. The petitions incorporating such proposals were denied by the District Judge on July 16, 1946 (R. 99) and July 31, 1946 (R. 142), respectively.

Among the considerations upon which the District Judge in the exercise of discretion based his determination that the several proposals should be rejected, were the following:

(1) The order of confirmation of the Trustee's Plan was entered May 13, 1946 and the time to appeal therefrom had expired on June 22, 1946, some weeks prior to the filing of the petitions.

(2) The confirmed plan was "fair and equitable."

(3) The consummation of the Trustee's Plan was completed in substance.

(4) The so-called commitment of the Underwriter was entirely illusory, being inadequate with respect to time and the amount thereof and otherwise.

(5) All of the parties who had appeared in the proceedings had consented to the confirmed plan and had acquiesced in its approval and confirmation.

(6) The stockholders and bondholders qualified to vote on the plan had accepted the plan by votes in favor thereof of 85% and 99%, respectively.

(7) The new plan was of doubtful benefit to stockholders.

(8) The "fee" of the Underwriter of 69,686 shares was unconscionable.

(9) Numerous persons had engaged in transactions in the securities of the old Company and in the shares of stock of the new Company on a "when issued" basis in reliance upon the integrity of the court order—the order of confirmation and the fact that the time to appeal from the order of confirmation had expired.

(10) No fraud, mistake, gross inequity or similar ground for vacating the previous orders of approval and confirmation was alleged or proved.

(11) The new plan would result in delay and increase the expense to which the Debtor would be subjected.

The Circuit Court of Appeals for the Second Circuit reversed the orders entered denying the petitions of Knight and Doyle (R. 436) and thereafter on the authority of such determination reversed the orders entered upon the petitions of the Debtor and the Committee of Common Stockholders (R. 437).

In reversing the orders, the Circuit Court of Appeals held that the District Judge abused his discretion in rejecting the proposals made on behalf of the petitioners and held that it was *mandatory* for the District Judge to submit the proposals to shareholders. In finding that the District Judge had abused his discretion, the court ruled on matters involving the construction of several sections of the Bankruptcy Act (R. 427-435). The court directed the method by which the judgments of reversal should be carried out in

its order ancillary to the two judgments (R. 438). The court held that the matters were not moot although the commitment had expired under its terms prior to submission in and determination of the matter by the court. The court failed to consider the contention that the petitions in substance were motions for a rehearing, orders denying which are not appealable.

II. Questions Presented

The questions presented are:

1. Did the Circuit Court of Appeals err in holding that the District Judge abused his discretion in refusing to approve, after the time to appeal from the order confirming the plan had expired, and after the plan had been substantially consummated, and upon the terms proposed including those in the illusory commitment, so-called modifications and amendments of a plan of reorganization which had been confirmed with the consent and acquiescence of all classes of creditors and stockholders and in refusing to vacate the order confirming the plan?

2. Did not the order of confirmation entered under Sec. 224 of the Act and the expiration of the time to appeal from such order vest in Petitioners who relied upon the order the right to receive the securities allocated to debenture holders under the plan?

3. What are the limitations upon the right to file modifications or alterations to a plan of reorganization under Section 222 of the Act (and are radical changes such as were proposed by respondents, permissible "modifications" or "alterations"?)

4. Did not the Circuit Court of Appeals err in holding that the questions presented were not moot?

5. Is not a petition to set aside an order of confirmation, such as respondents made herein, in effect a motion for a rehearing, the denial of which is not appealable?

III. Reasons Relied on For Allowance of The Writs

1. The decisions of the Circuit Court of Appeals present important questions in reorganization proceedings under Chapter 10 of the Bankruptcy Act which have not been, but should be, settled by this court.

2. The decisions of the Circuit Court of Appeals appear to be in conflict with decisions of other circuits and with former decisions of the Second Circuit.

3. The decisions of the Circuit Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Among other things, under the decisions, amendments to a confirmed plan are permitted up to the time the trustee is discharged making it impossible to trade in securities of a company in reorganization with any degree of safety prior to the time the trustee is discharged.

As to 1.—"Important Questions"

(a) Discretionary Action.

At the outset, the question of the finality to be attributed to a court order is presented. It is important that the limitations upon the right of a Circuit Court of Appeals to set aside discretionary orders of the District Judge in reorganization proceedings be reviewed and settled by this court —particularly in cases such as this where the time to appeal from the order of confirmation had expired and those challenging the discretionary action have been parties to and represented in the proceedings. The business world has become accustomed to placing reliance upon orders confirming plans of reorganization. Such a decision as that of the Court of Appeals in this matter, of course, will "chill" such reliance.

In reviewing the discretionary aspect of the action of the District Judge the Circuit Court of Appeals limited its consideration to three matters: (1) A conflict of interest

between the debenture holders and the shareholders, (2) the fact that after years of delay reorganization had finally culminated in a confirmed plan, and (3) doubts that a new company would have sufficient liquid assets. The determinations with respect to the effect of these several considerations involve questions in reorganization proceedings under the Act which have not been settled and which are outlined below. The uncertainty with respect to the matters considered requires settlement. In passing it may be noted that the Circuit Court of Appeals held that the adequacy of working capital was not a question even for the consideration of the District Judge (R. 435). More important, however, is the fact that the court failed to consider many of the circumstances upon which the District Judge undoubtedly relied. These circumstances in part are set forth on pages 6 and 7 of this petition. Among the more important matters which the court appears not to consider of importance in reviewing the propriety of the discretionary action of the District Judge are the following circumstances: (1) The entire inadequacies of the so-called commitment which was illusory when made and which expired under its terms even prior to the time the matter was submitted in the Circuit Court of Appeals, and (2) that all the parties who had appeared in the proceeding had consented to the confirmed plan and had acquiesced in its approval and confirmation.

Furthermore, it is apparent from the opinion that considerations as to enhanced value of the Debtor's property had considerable weight in the decision of the court. The fact is that the several petitions contained no allegations of enhanced value. The Circuit Court of Appeals appears to presume such enhancement as the result of the fact that the illusory commitment was made and the circumstance that in a narrow "over the counter" market, the price of the securities of the Debtor appeared to reflect an enhanced equity.

To summarize: questions are raised with respect to the proper construction and application of provisions of the Act to those facts considered, the propriety of the failure

of the Circuit Court of Appeals to consider circumstances which undoubtedly influenced the District Judge and the propriety of the court's action in presuming enhanced value.

This court has indicated that special weight should be given to findings of the District Judge in reorganization proceedings in view of his familiarity with the proceedings (*R. F. C.* v. *Denver & Rio G. W. R. Co.*, 90 Law Ed. 1134 (1946) in which this court reversed the decision of the Circuit Court of Appeals for the Tenth Circuit (reversing an order of confirmation of the District Court) and affirmed the District Court's order of confirmation; *Ins. Group* v. *Denver & Rio G. W. R. Co.*, No. 690, October Term, 1946, decided February 3, 1947—C. C. H., U. S. Supreme Court Bulletin, October Term 1946, page 677, in which this court affirmed the order of the District Court dismissing a petition of the debtor seeking to set aside an order confirming a plan of reorganization. *Cf., Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448.

(b) Effect of Section 224 regarding vesting of rights.

Section 224 of the Act provides in substance that "the plan and its provisions shall be *binding* upon the debtor—and upon all creditors and stockholders", and contains other provisions which would appear to make the confirmed plan definitive.

The indication in the available authorities is that the order of confirmation definitely fixes all the rights of all the parties.

For example, in *In re Diversey Bldg. Corp.*, 141 F. (2d) 68, C. C. A. 7, the Court, with respect to an order of confirmation, says "that decree, however, was interlocutory in its character, and definitely fixed all the rights of all the parties, and it was a final and appealable decree".

Other authorities are in accord. However, the Circuit Court of Appeals in the matter before the court held that the order of confirmation was "not conclusive" and that debenture holders were not "adversely affected" by the proposals of the respondents. In substance, the court held

that "modifications" or "alterations"—radical in their effect upon rights as determined by the plan—might be proposed at any time prior to the "final decree" under section 228, providing that "Upon ~~confirmation~~ CONFIRMATION—the judge shall enter a final decree (1)—terminating all rights and interests of stockholders * * *."

(c) Effect of Section 222 authorizing amendments.

Section 222 of the Act provides that "a plan may be altered or modified, with the approval of the judge, * * * before or after its confirmation * * *". The question arises as to the meaning of Section 222 when read with Section 224 and other provisions of the Act (such as Sections 226 and 228).

The indication in the authorities is that the modifications or alterations authorized under Section 224 are such changes "as will better aid in carrying out the plan which has been finally confirmed, and not such changes as will materially alter the property rights established by the decree of confirmation". In *In re Diversey Bldg. Corp.*, supra; *Country Life Apts.* v. *Buckley*, 145 F. (2d) 935, C. C. A. 2.

With respect to the power to amend given the court by Section 77B(f)—the antecedent of Section 222—the report of the Senate and House Judiciary Committees at the time the bill was under consideration by Congress reads in part: "Experience suggests the advisability of such a provision, as amendments are sometimes requisite, not only to obtain the required number of consents, but also after the required number of consents have been obtained, to provide for matters not foreseen, to correct errors, mistakes, omissions, etc." (S. Rep. No. 482, 73rd Cong., 2nd Sec. (1934) 9; H. Rep. No. 194, 73rd Cong., 1st Sec. (1933) 9.)

The proposals of the respondent were such that modifications or alterations incorporating the same could not be deemed the correction of "errors, mistakes and omissions". The Circuit Court of Appeals so held but deemed the proposals such as involved "matters unforeseen". In this regard, the court states that the rise in value of the debtor's

property (which the court presumed) could not have been foreseen at the time the plan was approved. This determination involves the questions as to whether modifications and amendments may be with respect to "matters not foreseen" and if so, whether a (presumed) increase in value is such as to constitute the basis of a modification or alteration. An application of the *sui generis* rule would indicate that the "matters not foreseen" should be limited to incidental changes such as "errors, mistakes and omissions". Likewise, in light of the fact that the Congressional Report comments on amendments "after the required number of consents have been obtained", the Congressional intent plainly is to permit only such amendments as would not require the securing of new consents.

(d) Effect of Expiration of Time to Appeal and Lapse of Time.

Uncertainty as to the effect of lapse of time upon the right to propose modifications or alterations to a plan exists. Petitions to alter or modify have been denied (1) after confirmation and expiration of the time to appeal (In *In re Diversey Bldg. Corp.*, supra); (2) at the time of confirmation (*Country Life Apts.* v. *Buckley*, supra); (3) after approval and before confirmation (*Rogers, et al.* v. *Consolidated Rock Products Co.*, 114 F. (2d) 108 C. C. A. 9).

Under the decisions of the Circuit Court of Appeals herein, modifications and alterations would be permissible at any time prior to the date of the entry of the "final decree" under Section 228 (R. 43). Complete consummation antedates this final decree. Properties have been transferred and securities issued. Certainly modifications and alterations should not be permitted after consummation in fact has been effected.

Many of the existing uncertainties adverted to above are referred to by Mr. Justice Reed in his opinion (R. 362-369). The desirability for clarification and settlement of these questions is apparent.

As to 2.—"Conflicts"

(a) With Respect to Nature of Amendments.

The decisions of the Circuit Court of Appeals appear to be in conflict with decisions of the Circuit Courts of Appeals of the First, Second, Seventh, and Ninth Circuits, to the effect that amendments and modifications permissible under Section 222 (and under former Section 77B(f)) are limited to "such changes as will better aid in carrying out the plan which has been finally confirmed".

In *In re Diversey Bldg. Corp.*, 141 F. (2d) 68, C. C. A. 7, the court with respect to Section 77B(f) said:

> "We cannot accept appellant's interpretation of subsection (f) of this Act. We are convinced that Congress did not intend that a debtor corporation should be permitted to ask for a radical change of a plan of reorganization after it had been confirmed by the court and was being executed under the court's supervision • • •
>
> "We interpret subsection (f) to mean that changes and modifications after the plan is confirmed refer to *such changes as will better aid in carrying out the plan* which has been finally confirmed, and *not such changes or modifications as will materially alter the property rights established by the decree of confirmation,* and in no event shall any change be made without the consent of the court." (Italics ours.)

The following cases are substantially to the same effect:

Country Life Apts. v. *Buckley,* 145 F. (2d) 935, C. C. A. 2;

Rogers v. *Consolidated Rock Products Co.,* 114 F. (2d) 108, C. C. A. 9;

Downtown Inv. Ass'n v. *Boston Metropolitan Bldgs.,* 81 F. (2d) 314, C. C. A. 1.

(b) With Respect to Time of Amendment.

The decisions appear to be in conflict with decisions of the Seventh Circuit in so far as they hold that the proposals such as those of respondent may be offered subsequent to the order of confirmation and the expiration of the time to appeal. *In re Diversey Bldg. Corp.*, supra, cf., *R. F. C.* v. *Denver & Rio G. W. R. Co.*, 90 L. Ed. 1134.

As to 3.—Departure from usual course of judicial proceedings.

(a) Moot Questions.

The so-called commitment of the City investing Company expired on October 16, 1946 (R. 155), prior to the time of the argument in and decisions of the Circuit Court of Appeals.

Under such circumstances where the element of controversy disappears from a case, whether by act of the parties or change of circumstances, the matter becomes moot. The authorities uniformly hold that a Federal Court is without power to decide moot questions or give advisory opinions which cannot affect the rights of the litigants in the case before the court. *U. S.* v. *Alaska Steamship Co.*, 253 U. S. 113; *St. Pierre* v. *U. S.*, 319 U. S. 41.

In the *Alaska Steamship Co.* case, supra, this court at page 116 stated:

> "Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot, and should be treated accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.' "

(b) Motion for rehearing—not appealable.

The Circuit Court of Appeals disregarded the contention of petitioners that the petition, in so far as it sought the vacation of the order of confirmation, was, in effect, a motion for a rehearing and that the order of denial was not appealable.

It is well established by the decisions of this court that neither a refusal to entertain such a motion nor a denial of such a motion, if entertained, is appealable. *Wayne Gas Co.* v. *Owens-Ill. Glass Co.*, 300 U. S. 131, 137; cf. *Ins. Group* v. *D. & R. G. W. RR. Co.* No. 690, October Term 1946, decided February 3, 1947.

(c) Principles applicable to judicial sale.

The desirability of attributing finality to a judicial sale is well established. Except upon the extremest provocation, courts will not upset a judicial sale. The beneficial result of the rule is that a prospective bidder may not refrain from bidding, bide his time and then outbid the price at which the property has been struck down. A contrary rule would chill bidding and defeat the very purpose of the auction. The Circuit Court of Appeals recognized the rule and its beneficial principles, but held the principles inapplicable to a plan of reorganization and an order of confirmation (R. 433-4).

A realistic view would appear to disclose the analogy between the sale and the order of confirmation strikingly apparent. The order should be set aside only upon the "extremest provocation".

If the analogy had been settled last July, the long delay of months and probably a year at least would have been avoided in the instant matter. If the analogy is not settled, interminable delay may result in this matter. Others such as Knight and Doyle may be biding their time waiting to offer some new proposal or proposals. In this regard, this matter is characteristic of many reorganization proceedings.

Conclusion

It is important in the administration of the Bankruptcy Act that the novel implications of the decisions of the Circuit Court of Appeals be set at rest and that trustworthy standards be settled regarding the matters presented. The questions are of public concern in the entire field of corporate reorganizations, as well as to the many persons in the matter presently before the Court. Settlement of the questions involved will lessen the number of controversies presented in proceedings under Chapter 10 of the Act and avoid prolonged delay in the settlement of such controversies.

WHEREFORE, your petitioners respectfully pray that writs of certiorari issue out of and under the seal of this court, directed to the Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court a full and complete transcript of the record of the proceedings of said Circuit Court of Appeals to the end that these causes may be reviewed and determined by this court as provided for by the statutes of the United States, and that the said judgments and order of said court may be reversed by this court, and for such other and further relief as to this court may seem proper.

Dated, March 27, 1947.

HUDSON MCGUIRE; Duncan Sterling et al., doing business under the partnership name and style of Sterling Grace & Co.; Duncan Sterling et al., as trustees for Ellen Furey; Jacques Pascal; and Howard M. Erskine,
Petitioners

By

George T. Barker
Counsel for Petitioners

APPENDIX

Sections of Chapter X of the Bankruptcy Act

Article XI—Confirmation and Consummation of Plan

Sec. 221. The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such officers, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

Sec. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or

modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

SEC. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.

SEC. 224. Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

SEC. 225. Where the claims or stock specified in paragraph (4), clause (b), of section 224 of this Act are objected to by any party in interest, the objection shall be heard and summarily determined by the Court.

SEC. 226. The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

SEC. 227. The court may direct the debtor, its trustee any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.

SEC. 228. Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

• • • •

SEC. 236. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

(1) where the petition was filed under section 127 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

Federal Rules of Civil Procedure

Rule 60. Relief from Judgment or Order.

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C. A. Title 28, § 118, a judgment obtained against a defendant not actually personally notified.